FILED
APR 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT LEE NOBLES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* FEDERAL PUBLIC DEFENDER OF NEW JERSEY, IN SUPPORT OF RESPONDENT

ROGER A. LOWENSTEIN
Federal Public Defender
976 Broad Street
Newark, New Jersey 07102

Counsel to Amicus Federal Public Defender of New Jersey

With him on the brief:

DAVID A. RUHNKE
Seton Hall Law School
1095 Raymond Boulevard
Newark, New Jersey 07102

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Statement of Interest of *Amicus*

Amicus is the Office of the Federal Public Defender for the District of New Jersey. The Federal Public Defender's Offices have been organized pursuant to the Criminal Justice Act. The Federal Public Defender Office

in New Jersey represents indigent defendants in the New Jersey federal districts courts. The staff of the office consists of five attorneys, two investigators and two legal secretaries. Without the assistance of the two investigators, the office of the *Amicus* could not effectively maintain its large case load, nor could clients be effectively represented. The principal protagonist in the case presently before this Court, Mr. Bond, is the defense investigator in the Federal Public Defender's Office in Los Angeles. The discovery of Mr. Bond's notes and the legal principles asserted by the government in this case touch upon the very effectiveness of the Office of the Federal Public Defender in providing adequate representation to its clients, and for that reason, this brief is submitted as a friend of the Court.

I

The decision below may be affirmed on settled principles of evidence.

Ordering a defense investigator to make available to the Government a copy of interview notes raises legal questions that "are as unchartered as they are fundamental." *United States* v. *Wright,* 489 F. 2d 1181, 1188 (D. C. Cir. 1973). The decision below may be affirmed, however, on settled principles of evidence. See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346-48 (1936) (opinion of Brandeis, J., concurring).

A. Under common law rules of evidence governing the trial in this case, the investigator would not have been required to turn over copies of his notes to the Government unless and until he used those notes to refresh his memory.

It is a "hornbook rule of evidence" that a writing used by a witness to refresh a temporarily stale memory must be turned over to the opposing party for cross-examination purposes. See, e.g., *United States* v. *Wright*, 489 F. 2d 1181, 1188 (D. C. Cir. 1973); *McCormick on Evidence*, § 9, p. 17 (2d ed. 1972); 3 *Wigmore, Evidence*, § 762 (Chadbourn Rev. 1970); but cf. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 233 (1940) (opposing counsel not entitled to inspect transcript of prior testimony where judge read portions thereof to refresh a witness' memory).

In the case at hand, the trial judge's order may best be described as premature. The investigator never got the chance to testify.

In his dissent below, Judge Kilkenny assumed that the investigator, upon taking the stand, "would have said that he used the statement to refresh his memory." *United States* v. *Brown*, 501 F. 2d 146, 159 (9th Cir. 1974) (opinion of Kilkenny, J., dissenting). The Government, arguing alternatively, makes a similar assumption. (Gov't's Brief at 40.) Leaving aside the propriety of assuming critical facts in a criminal case, an opposite assumption to the one used by the dissenting judge and the Government is equally if not more likely.

A defense investigator is not just any witness. It is fair to assume that defense counsel and investigator conferred on the Nobles defense on numerous occasions. It was crucial to the defense that the two eyewitnesses be discredited, and certainly, the statements given by the witnesses to the investigator were of great value to the

defense in that effort. It is unlikely that Mr. Bond would have had to refer to his notes to recall the statements on the day of the trial. The much more likely assumption is that Mr. Bond would have testified from his own independent recollection of the statements. Therefore, on common law principles of evidence, the Government would not have been entitled to use the notes on cross-examination.

B. Even had the investigator used his notes prior to testifying at trial, and even had the new evidence rules been in effect, the government would still not have been entitled to use the reports for the purpose of cross-examining the investigator.

The new Federal Rules of Evidence (P.L. 93-595, 88 Stat. 1929 *et seq.*) were signed into law by President Ford on January 2, 1975. They take effect on July 1, 1975, and, of course, in no way governed the conduct of the trial here under scrutiny. Nevertheless, the Government argues that the new rules are persuasive authority for what common law rules should be. (Gov't's Brief at 35-44.) As discussed above, settled principles of common law evidence militate against the result urged on the Court by the Government. It is the position of *amicus* that the new rules of evidence are persuasive only on the question of what rules of evidence congress feels should govern the federal practice. However, even accepting *arguendo* the proposition that the new rules should control this case, the result is identical. First, unless and until there was a showing that the investigator had used the notes to refresh his memory prior to or during trial, the Government was not entitled to make any use of them. Second, by the same token, unless the investigator's notes rose to the status of a "statement", the Government was not entitled to inspect or use the notes.

1. The investigator's notes are not a "statement" within the meaning of new rule 613(a)

Under new rule 613(a), where counsel is examining a witness concerning the witness' prior statement, that statement must be made available for inspection at that time upon the request of opposing counsel. In the present case, the Government concedes that something was indeed made available to it concerning a "statement" of the eyewitness Van Gemeren. (Gov't's Brief at 36-37, n. 13.) The "statement" referred to is the disputed investigator's report. The eyewitness in no way endorsed this report. It is highly unlikely that notes of an interview made by the interviewing party without the review or endorsement of the person being interviewed can even rise to the status of a "statement." See, e.g., *Palermo* v. *United States,* 360 U. S. 343 (1959) (summary of interrogation not witness' statement); *United States* v. *Swindler,* 476 F. 2d 167, 169 (10th Cir. 1973) (informal descriptions of testimony of several other witnesses not their statements); *United States* v. *Krilich,* 470 F. 2d 341 (7th Cir.), *cert.* denied 411 U. S. 938 (1972) (witness' summary of investigation not statement); *Kane* v. *United States,* 431 F. 2d 172, 174 (8th Cir. 1970) (interviewer's notes not statement where witness did not adopt or approve contents of notes). Therefore, even were new rule 613(a) to apply retroactively to the facts of this case, the item in question cannot be said to be a "statement".

2. New rule 612 also has no application to the facts of the present case

Under new rule 612 of the Federal Rules of Evidence, a witness who uses a writing to refresh his or her memory while testifying or *prior* to testifying must make

the writing available to the adverse party. The government contends that the new rule will create a two-way Jencks Act. (Gov't's Brief at 39.) That contention is patently nonsensical.

In enacting the Jencks Act, 18 U.S.C. § 3500 (1970), Congress sought to limit the effect of this Court's decision in *Jencks* v. *United States,* 353 U. S. 657 (1957). Neither that decision nor the congressional enactment have anything to do with the subject matter of new Rule 612. The rule is concerned with the evidentiary question of refreshed memory. Absent a showing that the witness' memory had to be refreshed prior to or during the trial, the rule does not operate. Imprecise analogies in the Advisory Committee's Note to the contrary notwithstanding,[1] the rule is concerned solely with refreshed memory. The Government concedes this much:

> [New Rule 612] would have required production at trial, for purposes of cross-examination of Bond, of the relevant portions of Bond's notes, *assuming that Bond had used the notes to refresh his recollection.* (Gov't's Brief at 40, emphasis added)

The Government argues that 1) this Court should assume the retroactive application of the new rules, and, 2) this Court should also assume the existence of the rules' triggering event—use of a writing to refresh memory. Neither assumption is warranted by law or fact.

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[1] In discussing the new rule, the Advisory Committee made extensive analogy to the Jencks Act, but only so far as the Committee saw the Jencks Act as promoting "the search of credibility and memory." 56 F.R.D. at 277. The Committee went on to note that the Jencks Act operates whether or not the government witness uses a statement to refresh his or her memory, a situation beyond the scope of the new rule.

II

Among the "complex of values" inherent in the Fifth Amendment is the concept that the defendant in a criminal case is under no compulsion to provide the Government with information that the defendant has no desire to use at trial.

A. The defense investigator's notes could not have been made the subject of a pre-trial discovery order.

Federal Rule of Criminal Procedure 16(c) permits the Government to obtain a court order conditioning a defendant's right to discover government information on his or her willingness to permit the government, in return, "to inspect, copy or photograph" material which "the defendant intends to produce at trial . . ." *F.R.Crim.P.* 16(c).

The defendant here did not seek to introduce the investigator's notes into evidence or in any other way "produce" the report at trial. Counsel had a copy of the report with him at counsel table. Certainly that fact alone would not entitle the Government to examine and use it. To the extent, then, that the reciprocal discovery provisions of the federal rules are a permitted derogation of the principle that the government must convict without assistance from the accused, the Government's argument reaches beyond the limits of permitted pretrial discovery.

The fact that the Government's right to discovery is limited to documents which the accused intends to produce at trial is central to insulating the rule from constitutional challenge. See 1 *Wright, Federal Practice and Procedure* § 255 at 520 (1969). F.R.Crim.P. 16(c) goes to the very edge of the Fifth Amendment's protections. *See* 39 F.R.D. 252, 272 and 277 (1966) (opinions of Justices Black and Douglas, respectively, dissenting from the proposed amendments to F.R.Crim.P. 16.) The position

urged by the Government goes beyond Rule 16's limits and intrudes into areas protected by the Fifth Amendment.

B. The Jencks Act is not a two-way street.

As noted earlier much of the Government's argument centers upon the idea that it is unfair that the Government must make available to the defense statements of Government witnesses at the close of their direct testimony without the defense having to assist the Government in return. (Gov't's brief at 22-28.) A mutual exchange of statements is not the issue here. In his dissent below, Judge Kilkenny, who assumed that the investigator would have had to have refreshed his recollection had he been permitted to testify, said the issue was simply

> a common law evidentiary question of whether a witness who was called for impeachment purposes must produce the notes he admittedly made on the subject of impeachment. *United States* v. *Brown,* 501 F.2d at 161 (9th Cir. 1974) (opinion of Kilkenny, J., dissenting).

The Government does not urge (as it could not) that the Jencks Act, by its terms, applied to the facts of this case.[2] The end-result is, however, the same. As in *United States* v. *Wright,* supra,

> the Government proposes that this court adopt a common law rule of evidence which requires the defense, after its witness has testified on direct examination, to turn over to the prosecution prior

[2] The Jencks Act requires the government to provide to the defense statements of government witnesses. 18 U.S.C. § 3500 (1970).

> statements of that witness so that those statements could be used by the Government to cross-examine the witness. In effect, this rule would make the Jencks Act applicable in principle if not in express terms to the defense as well as the prosecution. 489 F.2d at 1190 (D.C.Cir. 1973).

In *Wright,* supra, the District of Columbia Circuit considered the argument in detail, and concluded that

> The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution as evidence against the accused. *Id.* at 1195 (D.C. Cir. 1973).

Despite the clear treatment of this kind of discovery in rule and statute, the Government maintains that if the defense has access to statements of Government witnesses, then the Government ought to have access to statements of defense witnesses. Complete mutuality of discovery may be an appropriate guide where private parties dispute over private matters, but where the Government seeks to enforce criminal laws, mutuality is inappropriate. For example, the Government is under a duty to reveal information to the defense which may bear on the innocence of the accused, *Brady* v. *Maryland,* 373 U.S. 83 (1963). The defense could certainly never be required to respond in kind.

> Except in pursuit of abstract symmetry, the discovery that a defendant can get is not logically related to what the prosecution gets. To deny defense discovery because of limitations that the privilege against self-incrimination imposes on prosecution

> discovery is to transform a constitutional protection so important that conditions cannot be imposed on its exercise into an excuse for a diminution of the defedant's chance to clear himself. Nakell, *Criminal Discovery for the Defense and Prosecution—The Developing Constitutional Considerations,* 50 N.Car.L.Rev. 437, 443-44 (1972) (footnote omitted).

Ignoring the fact that discovery in a criminal case can never be a free-flowing, two-way street between the accuser and the accused the Government urges that this Court add a reciprocity feature to the Jencks Act. Neither the Act nor the new rules of evidence justify a result that so violates the protections of the Fifth Amendment.

C. Recent decisions of this Court do not justify the routine discovery by the government of statements of defense witnesses.

In recent years, this Court has had occasion to consider the reach of the government's right to discover elements or strategy of a defense to a criminal charge. Compare *Williams* v. *Florida,* 399 U.S. 78 (1970) (state alibi-notice requirement held constitutional) with *Brooks* v. *Tennessee,* 406 U.S. 605 (1972) (state requirement that defendant testify as first defense witness, or not at all, held violative of Fourteenth Amendment). In reaching its decisions, this Court has always emphasized that the results followed from the premise that the defense need only reveal to the Government that which would appear anyway. Hence, in *Williams* v. *Florida, supra,* pretrial disclosure of the names of alibi witnesses affected only the timing of disclosure. In effect, this Court held in *Williams* that an accused does not have a right of Fifth Amendment dimension to launch a last-ditch defense. 399 U.S. at 81.

In this case, the Government seeks this Court's approval of an attempt to obtain materials which the defendant never intended to use as evidence or present as part of the defense. The Government does not justify its discovery argument by claiming the need to avoid surprise, cf. *Wardius* v. *Oregon*, 412 U.S. 470 (1973), nor does the Government argue that it seeks only that which would be revealed at trial, cf. *Williams* v. *Florida, supra*. Instead, the Government seeks a rule which would require a defendant to assist the Government in its attempts to dismantle the defense. The Fifth Amendment bars that result.

Despite the Government's arguments to the contrary, (Gov't's Brief at 45-48), the Fifth Amendment is something more than a personal privilege of a person accused of a crime. Rather, it reflects and protects a "complex of values." *Schmerber* v. *California*, 384 U. S. 757, 762 (1966).

The Amendment is not "a friend of open inquiry." *Nakell, supra*, 50 N.C. L. Rev. at 481. Instead, it embodies and protects fundamental value judgments of a free society. One of the most fundamental of those judgments is that the Government must shoulder the burden of conviction without the aid of the accused. Because that judgment is fundamental to an accusatorial system of criminal justice, the Amendment cannot long withstand nice distinctions. As Prof. Nakell concludes,

> Vigilance [in enforcing the amendment's protections] must be broader than the actual threats of abuse and nearly as broad as their possible scope. Because circumstances in which the application of the privilege against self-incrimination seems extravagant are . . . easy to find, the privilege is a common focus of majoritarian frustration. For this

> reason, the important work of the privilege needs the sanctity of a fundamental charter and a strong tradition of liberal interpretation. Being too often unpopular, it cannot withstand niggardly enforcement or cautious interpretation based on academically narrow distinctions. *Nakell, supra,* 50 N.C. L. Rev, at 515-16.

In a criminal prosecution, the accused has few enough friends, few enough advantages. See generally, Goldstein, *The State and the Accused: Balance of Advantages in Criminal Procedure,* 69 Yale L. J. 1149, 1185-92 (1960). At the very least, a defendant in Mr. Nobles' position has the right to expect that his witnesses will be free to testify from their independent memory of facts crucial to the defense without fear that otherwise irrelevant notes will thereby be made available to the Government and scrutinized for matters which will discredit the witness and, as a result, the defense.

Implicit in the Fifth Amendment is the right to prepare and present a defense. *United States* v. *Burr,* 25 F. Cas. 30, 32 (No. 14, 692d) (Cir. Ct. of Va. 1807). The reversal of the Ninth Circuit in this case would place an impermissible burden on that right.

III

An investigator for the defense is not just any witness.

With minor exceptions, the arguments of *amicus* to this point apply with equal force to any witness for the defense. The facts of this case do not, however, involve merely "any witness." The witness whose testimony was

excluded was a defense investigator, a vital member of the defense team. Where the Government seeks to discover and use notes of a defense investigator, it must show an interest superior to the accused's Sixth Amendment right to a vigorous and effective defense.

Adequate factual investigation is clearly a component of effective assistance of counsel. *McQueen* v. *Swenson*, 498 F.2d 207, 216 (8th Cir. 1974); *United States* v. *Wright*, 489 F.2d 1181, 1188 n.6 (D.C.Cir. 1973); *Shepherd* v. *Hunter*, 163 F.2d 872 (10th Cir. 1957); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Resources in Criminal Proceedings*, 55 Corn. L. Rev. 632 (1970).

The American Bar Association in setting standards for the provision of defense services to indigents concluded that the failure to provide adequate investigative support rendered any attempt to provide defense services *ipso facto* sub-standard. *A.B.A. Project on Standards for Criminal Justice, Standards Relating to Providing Defense Services* § 1.5 (Approved draft, 1968).

Additionally, in considering the elements of an adequate defense, the A.B.A. Project concluded:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case . . . regardless of the accused's admissions or statement to the lawyer of facts constituting guilt. *A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function* § 4.1 (Approved draft, 1971).

In a real sense, a criminal defendant's Fifth and Sixth Amendment privileges combine when the issue is the availability to the Government of a defense investigator's notes. Even the scattered state decisions arguably sup-

porting the Government's position[3] do not go so far. If an investigator has to worry about preparing notes and internal reports in such a fashion as to leave no room for expert cross-examination, the investigator's ability to function will be substantially impaired.

The Fifth Amendment commands that the Government bear its burden without help from the accused. The Sixth Amendment entitles the defendant to a vigorous and competent defense, including the benefit of a full factual investigation. It is immaterial whether the final product of that investigation is denominated "work product" or "privileged materials." It unduly strains the Fifth Amendment's protections to require that a defense investigator who wishes to testify on behalf of the defendant must automatically deliver to the Government prior notes on the subject of his testimony regardless of the defense's intention whether or not to use the material.

In attempting to pin down and name this class of evidence, it is possible to lose sight of the fact that what the Government is seeking is a rule which would require a defendant to present potentially useful information to the Government which the defendant never intended to use. The Fifth Amendment prevents that result.

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[3] The cases are collected in *United States* v. *Wright*, 489 F. 2d 1181, 1190 n.11 (D.C. Cir. 1973). *See also People* v. *Chavez*, 33 Cal.App.3d 454, 109 Cal.Rptr. 157 (1973).

With the exception of New Jersey, none of the decisions have been followed in any reported case within the jurisdiction so far as their "Jencks-in-reverse" aspect is concerned.

CONCLUSION

For the reasons above, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

ROGER A. LOWENSTEIN,
Federal Public Defender,
976 Broad Street,
Newark, New Jersey 07102.

Counsel to Amicus,
Federal Public Defender of New Jersey.